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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Pamela Neumann, *et al.*,

10 Plaintiffs,

11 v.

12 Home Depot U.S.A. Incorporated, *et al.*,

13 Defendants.
14

No. CV-20-00387-PHX-JJT

ORDER

15 At issue is the admissibility of expert testimony provided by Dr. Morse on behalf of
16 Plaintiffs Pamela, Julia, and Anna Neumann. The Court considers Defendant Home Depot
17 U.S.A. Incorporated's ("Home Depot") Motion to Exclude John Morse (Doc. 36, Mot.),
18 Plaintiff's Response (Doc. 41, Resp.), and Defendant's Reply (Doc. 47, Reply). The Court
19 finds this matter appropriate for decision without oral argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND**

21 **A. Brief Summary of Facts**

22 In November 2017, James Neumann ("Mr. Neumann") used a Krause ladder,¹ sold
23 by Defendant, to climb his roof. (Resp. at 1-2.) Julia Neumann ("Julia"), Mr. Neumann's
24 daughter, noticed the ladder bending inward while Mr. Neumann was on the roof, became
25 concerned, and went underneath the ladder to hold it for more stability. (Mot. at 2-3.)

26 ¹ A Krause ladder is composed of four sections, each three feet in length, connected by
27 three pairs of lockable hinges. (Resp. at 1.) One set of hinges is found one-quarter of the
28 way down the ladder, another set at the middle of the ladder, and a third set three-quarters
of the way down the ladder. (Resp. at 1.) Each pair of hinges has two locking bolts, one on
each side of the ladder. Each pair of hinges is unlocked by use of a release bar. (Resp. at
1-2.)

1 As Mr. Neumann descended the ladder, Julia believed that the ladder was not going
2 to hold his weight, but he continued to climb down. (Mot. at 3; Mot. Ex. 1 at 4.) Slowly,
3 the ladder began to bend further, and the middle hinges came inwards, towards where Julia
4 was standing. (Mot. at 3; Mot. Ex. 1 at 5.) Eventually, Julia had to move out of the way of
5 the ladder, at which point it collapsed. (Mot. Ex. 1 at 5.) Mr. Neumann fell backwards onto
6 the driveway, struck his head on the concrete surface, and later died of his injuries. (Resp.
7 at 2.)

8 **B. Dr. Morse's Opinions**

9 Plaintiffs retained Dr. John Morse ("Dr. Morse") as an expert witness for this matter.
10 (Resp. at 2; Resp. Ex. C at 2.) Due to the COVID-19 pandemic, Dr. Morse conducted a
11 visual inspection of the ladder through FaceTime to obtain information and identify areas
12 of concern. (Resp. at 3.) After travel reopened, Dr. Morse came to Arizona to conduct a
13 thorough, multi-hour investigation of the subject ladder and the incident scene. (Resp at 3.)
14 During the inspection, all the ladder joints were moved to their different positions and the
15 ladder was placed into various configurations, including the straight ladder mode. (Resp.
16 at 3.) The ladder was examined for damage and unusual conditions. (Resp. at 3.) Plaintiffs
17 claim extensive measurements were made of the incident scene, and a partial accident
18 reconstruction was created with the ladder being placed in the same approximate location
19 as the day of the fall. (Resp. at 3.) Dr. Morse ascended and descended the ladder multiple
20 times, noting the behavior of the ladder while Julia recounted her recollection of the
21 incident. (Resp. at 3.)

22 Based on the facts recounted to him, Dr. Morse offers two possible scenarios that
23 caused the fall and how each was caused by a design defect of the Krause ladder: (1) the
24 kick the bar scenario and (2) false latch scenario. (Resp. at 3.)

25 In the "kick the bar" scenario, Dr. Morse proffers that Mr. Neumann accidentally
26 kicked the middle release bar as he was descending the ladder, which caused the middle
27 hinges to unlock. (Resp. at 4.) In this state, the middle hinges would not support the load
28 on them as Mr. Neumann was climbing down the ladder. (Resp. Ex. A at 7.)

1 In the “false latch” scenario, the ladder was set up such that Mr. Neumann believed
2 the ladder was fully locked, but the joint was not straightened out far enough for the locking
3 bolt to fully engage. (Resp. at 4; Resp. Ex. A at 13.) Dr. Morse claims that his testing of
4 Krause hinges shows that false latching can occur quite readily during ladder set-up, and
5 that a Krause ladder can be set-up in the straight ladder position with the middle hinges in
6 a false latched position. (Resp. Ex. A at 14.)

7 Dr. Morse claims that both scenarios were caused by the ladder’s dangerous
8 condition and lack of adequate warning. (Resp. at 4.) Defendant, however, alleges that
9 Dr. Morse should be excluded pursuant to Fed. R. Evid. 702 and *Daubert* because his
10 opinions are insufficiently reliable. (Mot. at 2; Reply at 2.)

11 **II. LEGAL STANDARD**

12 Rule 702 of the Federal Rules of Evidence tasks the trial court with ensuring that
13 any expert testimony provided is relevant and reliable. *Daubert v. Merrell Dow Pharm.,*
14 *Inc. (Daubert)*, 509 U.S. 579, 589 (1999). “Evidence is relevant if it has any tendency to
15 make a fact more or less probable than it would be without the evidence and the fact is of
16 consequence in determining the action.” Fed. R. Evid. 401. The trial court must first assess
17 whether the testimony is valid and whether the reasoning or methodology can properly be
18 applied to the facts at issue. *Daubert*, 509 U.S. at 592–93. Factors to consider in this
19 assessment include: whether the methodology can be tested; whether the methodology has
20 been subjected to peer review; whether the methodology has a known or potential rate of
21 error; and whether the methodology has been generally accepted within the relevant
22 professional community. *Id.* at 593–94. “The inquiry envisioned by Rule 702” is “a flexible
23 one.” *Id.* at 594. “The focus . . . must be solely on principles and methodology, not on the
24 conclusions that they generate.” *Id.*

25 The *Daubert* analysis is applicable to testimony concerning scientific and non-
26 scientific areas of specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S.
27 137, 141 (1999). However, the *Daubert* factors may not apply to testimony that depends
28 on knowledge and experience of the expert, rather than a particular methodology. *U.S. v.*

1 *Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (citation omitted) (finding that *Daubert*
 2 factors do not apply to police officer's testimony based on 21 years of experience working
 3 undercover with gangs). An expert qualified by experience may testify in the form of
 4 opinion if his or her experiential knowledge will help the trier of fact to understand
 5 evidence or determine a fact in issue, as long as the testimony is based on sufficient data,
 6 is the product of reliable principles, and the expert has reliably applied the principles to the
 7 facts of the case. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 579.

8 The advisory committee notes on the 2000 amendments to Rule 702 explain that
 9 Rule 702 (as amended in response to *Daubert*) "is not intended to provide an excuse for an
 10 automatic challenge to the testimony of every expert." *See Kumho Tire Co.*, 526 U.S.
 11 at 152. "Vigorous cross-examination, presentation of contrary evidence, and careful
 12 instruction on the burden of proof are the traditional and appropriate means of attacking
 13 shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted).

14 **III. ANALYSIS**

15 In their Motion to Exclude, Defendant offers four arguments in support of excluding
 16 Dr. Morse's testimony: (1) that Dr. Morse is an "expert for hire" because his opinions were
 17 developed solely for litigation (Mot. at 5-6); (2) Dr. Morse is an unreliable expert (Mot. at 5);
 18 (3) Dr. Morse provides fact characterizations (Mot. at 9); and (4) Dr. Morse provides legal
 19 conclusions. (Mot. at 14-16.)

20 **A. Relevant Expertise**

21 "Persons with specialized knowledge may testify if their testimony will be helpful
 22 to the trier of fact in determining an issue of fact. A witness can qualify as an expert through
 23 practical experience in a particular field, not just through academic training." *Rogers v.*
 24 *Raymark Industries, Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991).

25 Defendant argues that Dr. Morse is an "expert for hire" because his opinions were
 26 developed solely for litigation, and not based on independent research. (Mot. at 5-6.)
 27 Defendant contends Dr. Morse has "no experience manufacturing or designing ladders."
 28 (Mot. at 6.) Instead, he has litigation experience in 62 categories of products, including

1 ladders. (Mot. at 6.) Therefore, he is subject to a more rigorous *Daubert* inquiry. (Mot.
 2 at 6.) Plaintiffs claim that Dr. Morse is qualified to opine on the design and safety of ladders
 3 based on his education, knowledge, and experience. (Resp. at 6.)

4 Dr. Morse is a Licensed Professional engineer in five states who holds a Bachelor's
 5 degree in mechanical engineering from John Brown University and a Ph.D. in mechanical
 6 engineering from Louisiana State University. (Resp. at 5.) Dr. Morse has investigated over
 7 575 ladder and climbing accidents. (Resp. at 5.) Specifically, he has investigated over 30
 8 Krause ladder failures, which is the type of ladder at issue. (Resp. at 6.) He has worked on
 9 the design and development of different parts of safety equipment attached to ladders, and
 10 has designed ladders, components of ladders, warnings for ladders, and authored
 11 publications on ladder safety. (Resp. at 6.)

12 Dr. Morse's experience is certainly relevant to the issues in this case. While a
 13 professional expert hired to testify on a wide range of topics with great frequency may
 14 indeed not pass muster as an expert in a specific field, *see Rascon v. Brookins*, No. CV-14-
 15 00749-PHX-JJT, 2018 WL 739696, at *3 (D. Ariz. Feb. 7, 2018), Dr. Morse's design
 16 experience and authored publications are relevant to the issues in this particular matter.
 17 Defendants argue that Dr. Morse's experience is outdated because he has only authored
 18 three scientific papers related to ladders, of which the most recent was authored 13 years
 19 ago, but they will have the opportunity to raise this issue during cross-examination. (Reply
 20 at 11.) Here, the age of Dr. Morse's research does not make it irrelevant.

21 The Court disagrees with Defendant's contention that Dr. Morse is an "expert for
 22 hire." Thus, Dr. Morse is not subject to a more rigorous *Daubert* inquiry.

23 **B. Helpfulness and Reliability of Testimony**

24 Defendant also contends that Dr. Morse's testimony should be excluded in its
 25 entirety because it is unreliable, and consists of fact characterizations, and/or legal
 26 conclusions. The Court will address each of Defendant's arguments in turn.

1 **1. Reliability**

2 The Supreme Court has articulated four non-exclusive factors to consider in
 3 assessing an expert's reliability: (1) whether the scientific theory or technique can be (and
 4 has been) tested; (2) whether the theory or technique has been subjected to peer review and
 5 publication; and (3) whether a particular technique has a known potential rate of error; and
 6 (4) whether the theory or technique is generally accepted in the scientific community.
 7 *Daubert*, 509 U.S. at 593-94.

8 Most of Defendant's arguments that fall under the first and fourth *Daubert* factors
 9 challenge Dr. Morse's methodology and whether it is accepted in the scientific community.
 10 (*See generally* Mot.) Dr. Morse relies on the National Safety Council Accident Prevention
 11 Manual, claiming that it establishes a scientific method for hazard evaluation.² (Resp. at
 12 4.) Dr. Morse also relies on the National Safety Council design hierarchy, which indicates
 13 what should be done after a hazard evaluation.³ (Resp. at 4-5.) Dr. Morse claims that the
 14 National Safety Council's design hierarchy is very similar to the process described by the
 15 American Society of Mechanical Engineers.⁴ (Resp. at 5.) To that end, he contends the

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 17 ² The Accident Prevention Manual lists five steps (and an optional sixth step) that outlines
 18 a hazard evaluation/risk assessment: (1) establish the boundaries; (2) identify the hazards;
 19 (3) determine the failure modes that can lead to realization of a hazard; (4) evaluate the
 exposure of the hazard; (5) identify the consequences of realizing the hazard; and (6) find
 the probability of the hazard being realized. (Resp. Ex. A at 8-9.)

20 ³ Five hierarchical steps are taken to deal with any hazard that has been identified. (Resp.
 21 Ex. A at 9-10.) The first strategy is considered, and all practical applications must be
 22 exhausted before considering the second. (Resp. Ex. A at 9-10.) The second strategy is to
 23 be addressed before the third, and so on. (Resp. Ex. A at 9-10.) The five hierarchical steps,
 from most to least desirable are: (1) eliminate or reduce the risk; (2) incorporate
 guards/safety devices; (3) provide warning devices; (4) implement operating procedures
 and worker training; and (5) use personal protective equipment. (Resp. Ex. A at 9-10.)

24 ⁴ "There are six basic guidelines which a designer can apply in order to maximize the safety
 25 level of his products or manufacturing processes. The National Safety Council has
 26 published this list in descending order of effectiveness. One should rely upon the highest
 27 concept attainable, but if this is not possible, the very next one shown should be used. In
 28 brief these are: 1. Eliminate the hazard from the product or process by altering its design,
 material, usage or maintenance method. 2. Control the hazard by capturing, enclosing or
 guarding it at its source. 3. Train personnel to be aware of the hazard and to follow safe
 procedures to avoid it. 4. Provide adequate warnings and instructions in appropriate forms
 and locations. 5. Anticipate common areas and methods of abuse and take steps to eliminate
 or minimize the consequences associated with such actions. 6. Provide personal protective
 equipment to shield personnel against the hazard." (Resp. Ex. A at 10-11.)

1 “hierarchy is generally accepted in the field of engineering” as a standard model of analysis
2 (Resp. at 5; Resp. Ex. C ¶ 28.) Defendant argues that Dr. Morse’s claims are *ipse dixit*
3 because he fails to direct the Court to any cases where these standards have been accepted
4 in the ladder industry. (Reply at 6.)

5 Courts have cautioned against applying the reliability requirement too strictly,
6 explaining that “the reliability requirement must not be used as a tool by which the court
7 excludes all questionably reliable evidence.” *Voilas v. Gen. Motors Co.*, 73 F. Supp. 2d
8 452, 460 (D.N.J. 1999) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d
9 Cir. 1994)). Rather, “[i]n the final analysis, [t]he touchstone of Rule 702 ... is the
10 helpfulness of the expert testimony, *i.e.*, whether it will assist the trier of fact to understand
11 the evidence or to determine a fact in issue.” *Id.* (citations and internal quotation marks
12 omitted). The Court finds that Dr. Morse’s reliance on the Accident Prevention Manual
13 and design hierarchy provides at least some frame of reference for his judgment that either
14 the kick the bar scenario or false latch scenario caused the fall.

15 Defendant also asserts that Dr. Morse did not verify his theories through testing.
16 (Mot. at 9.) Rather, Dr. Morse relied on a subjective analysis and visual inspection of the
17 ladder. (Mot. at 9-10.) The Court disagrees. Although Dr. Morse initially conducted a
18 visual inspection of the ladder on FaceTime due to COVID-19 restrictions, he eventually
19 carried out a detailed, multi-hour inspection of the subject ladder and fall site. (Resp. at 3.)
20 His inspection included reconfiguring the ladder, testing the clamping force of the joints, a
21 partial accident reconstruction, taking countless measurements, and climbing multiple
22 times on the subject ladder.⁵ (Resp. at 8.) While Dr. Morse’s methodology could have been
23 more clear,⁶ Defendant may explore any perceived weaknesses through “[v]igorous cross-

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25 ⁵ Defendant alleges that Dr. Morse should have performed ANSI A14.2 tests on an
26 exemplar ladder. (Mot. at 10.) Plaintiffs, however, assert that Dr. Morse did not perform
27 any ANSI A14.2 tests because they are inapplicable for kicking or otherwise striking a
28 release bar, or that involve a ladder joint in a partially locked condition. (Resp. Ex. C at ¶
36.)

⁶ It would have benefited the Court and the parties if Dr. Morse had more clearly laid out
the application of the methodology taken from the Accident Prevention Manual and design
hierarchy.

1 examination, presentation of contrary evidence, and careful instruction on the burden of
2 proof” to attack “shaky but admissible evidence.” *Daubert*, 509 U.S. at 596.

3 Next, the Court considers Defendant’s arguments that fall under the second *Daubert*
4 factor. Defendant asserts that Dr. Morse did not ground his theories on scholarly articles or
5 publications. (Mot. at 9-10.) He did not provide any articles or papers showing that
6 engineers in the ladder industry recognize the “kick the bar” scenario. (Mot. at 10.)
7 Plaintiffs argue that Dr. Morse’s theories do not need to be subjected to publication to be
8 admissible because his opinions are validly grounded by his vast experience. (Resp.
9 at 8-11.) The Court agrees with Plaintiffs.

10 Where an expert has applied his extensive experience, a lack of peer review,
11 publication, and general acceptance in the field is not dispositive for the reliability analysis
12 because the expert's opinion is the result of the expert's experience, not science. *Geiger v.*
13 *Creative Impact Inc.*, No. CV-18-01443-PHX-JAT, 2020 WL 3268675, at *8 (D. Ariz.
14 June 17, 2020). *See* Fed. R. Evid. 702 Committee Notes on Rules—2000 Amendment
15 (when an expert’s opinion is based on the “application of extensive experience,” it is based
16 on reliable principles and methods); *See also Aguilar v. Werner Enterprises, Inc.*, 2013 WL
17 12097447 at *5 (D. Ariz. 2013) (expert permitted to testify despite absence of peer review
18 because he “formed his opinion based on his past experience, which is extensive, and his
19 ability to relate that experience to the subject tire, which he examined.”).

20 Dr. Morse has investigated over 575 ladder and climbing accidents, 30 of which
21 were Krause ladder incidents involving hinge collapses.⁷ (Resp. Ex. C ¶ 4.) In developing
22 his opinion on the failure of the subject ladder, Dr. Morse admits to adopting the “kick the
23 bar” scenario from a case he cites in his rebuttal report. (Resp. Ex. B at 11.) Defendant
24 argues that Dr. Morse relied on hearsay because he did not personally investigate that case.
25 (Mot. at 13-14.) Instead, he talked to the expert, watched their video demonstrating the

26 ⁷ It would have benefited the Court and the parties if Dr. Morse more clearly laid out some
27 of these incidents, instead of providing a case name, court, and case number. (Mot. Ex. 2
28 at 28.) Dr. Morse asserting that he has “personal knowledge” of these incidents is
somewhat vague (Resp. Ex. A at 27-28), but “[i]n many instances cross-examination will
be sufficient to expose defects in an expert’s presentation.” *Harrington v. Richter*, 562 U.S.
86, 111 (2011).

1 “kick the bar” scenario, and read the deposition transcript. (Mot. at 14.) Moreover, the
 2 ladder in that case had xylan-coated lock bolts, which the subject ladder did not possess.⁸
 3 (Mot. at 11-12.)

4 The Court finds that Dr. Morse’s reliance on the testing of other experts is well
 5 within the guidance of *Daubert* and Rule 702. Dr. Morse may base his testimony upon an
 6 analysis of testing performed by other engineers. *See Doyle v. Chrysler Group LLC*, SACV
 7 13-00620 JVS, 2015 WL 353993, at *6 (C.D. Cal. Jan. 21, 2015); *See* Fed. R. Evid. 703
 8 (“An expert may base an opinion on facts or data in the case that the expert has been made
 9 aware of or personally observed.”); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,
 10 592 (“Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to
 11 offer opinions, including those that are not based on firsthand knowledge or observation.
 12 See Rules 702 and 703.”); *Paeschke v. Gen. Motors LLC*, 4:16-CV-5050-LRS, 2017 WL
 13 4003382, at *3 (E.D. Wash. Aug. 18, 2017) (“The facts and data upon which an expert may
 14 rely in reaching an expert opinion includes the opinions and findings of other experts, if
 15 experts in their respective field would reasonably rely on other expert's opinions and
 16 findings.”).

17 Defendant further alleges that Dr. Morse’s reliance on instances that have ladders
 18 in the stepladder configuration, instead of the straight ladder configuration, are irrelevant.
 19 (Mot. at 12-13.) Defendant points to Dr. Morse’s rebuttal report, which states that “the
 20 configuration of the ladder may influence the clamping force on the locking bolt.” (Mot.
 21 at 13; Mot. Ex. 3 at 17.) To that end, Defendant argues that any incidents that involve a
 22 purported “kick the bar” scenario in the stepladder configuration are not substantially
 23 similar, and Dr. Morse’s reliance on these incidents is misplaced (Mot. at 13.) Although
 24 Dr. Morse admits that the length of the ladder may influence the magnitude of the forces

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 26 ⁸ Defendant’s expert, Jon Ver Halen, asserts Dr. Morse based the “kick the bar” scenario
 27 on cases with ladders with xylan-coated zinc lock bolts. (Mot. Ex. 4 at 5; Mot. at 12.) These
 28 bolts have “less friction than the uncoated bolts on the subject ladder,” and thus, the Krause
 ladder “would be even less prone to accidental unlocking.” (Mot. Ex. 4 at 5.) Defendant
 argues that any reference to the “kick the bar” scenario should not be part of this case.
 (Mot. at 12.) The Court finds that this goes to the weight of the evidence, not its
 admissibility.

1 on the locking bolts, based on Dr. Morse's experience, he opines that the fundamental
 2 human factor design defects of the locking bolts are the same in both the straight ladder
 3 and stepladder configurations.⁹ (Resp. Ex. B at 17.) The Court finds that Defendant's
 4 arguments go to the weight of the evidence, not its admissibility.

5 Turning to the third *Daubert* factor, Plaintiffs assert that a known or potential rate
 6 of error is inapplicable to this case. (Resp. at 11-12.) The Court agrees. A district court has
 7 the discretion to not examine factors that are "not reasonable measures of reliability in a
 8 particular case." *Kumho Tire Co.*, 526 U.S. 137 at 153. Because of "the nature of the issue,
 9 the expert's particular expertise, and the subject of his testimony," this factor is not
 10 pertinent in assessing reliability. *Id.* at 138. Here, Dr. Morse physically examined the
 11 subject ladder and relied on his experience and expertise to make determinations in this
 12 case. The error rate factor does not easily fit the analysis before the Court.

13 Accordingly, the Court finds that Dr. Morse's methodology is sufficiently reliable
 14 to meet the Rule 702 standard.

15 **2. Fact Characterizations**

16 Defendant next argues that Dr. Morse's opinion regarding the cause of
 17 Mr. Neumann's fall is inadmissible because he relied on fabricated facts. (Mot. at 9.) As
 18 the Court stated above, Rule 702 provides that an expert qualified by experience may testify
 19 in the form of opinion if his or her experiential knowledge will help the trier of fact to
 20 understand evidence or determine a fact in issue. *See Daubert*, 509 U.S. at 579.

21 The examples of Dr. Morse's fact characterization that Defendant provides are
 22 simply disagreements between Plaintiffs and Defendant about what the facts show. For
 23 example, in challenging Dr. Morse's opinion about the possibility of Mr. Neumann
 24 accidentally kicking the release bar, Defendant states that the record shows "Julia did not
 25 testify that Neumann hit the release bar and instead testified that Neumann had not reached

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 27 ⁹ Dr. Morse explains that Krause locks have several human factor design defects. (Mot. Ex.
 28 2 at 17.) Among these are the relatively low amount of lock travel between unlocked and
 fully locked positions, the existence of false latch positions, the side detent position of the
 locking bolt, the markings Krause uses on the hinge halves, and the lack of contrast
 between the locking bolt and surrounding hinge parts. (Mot. Ex. 2 at 17.)

1 that step.” (Mot. at 9.) Defendant argues that Dr. Morse’s testimony regarding the kicked
 2 release bar scenario was not sound or reliable. (Mot. at 8.) Because Mr. Neumann “was
 3 about halfway but not fully halfway” down the ladder, Mr. Neumann could not have kicked
 4 the middle release bar. (Mot. at 8-9.) This fact is clearly and genuinely disputed between
 5 the parties. Dr. Morse stated in his rebuttal report that the position of Mr. Neumann’s feet
 6 on the ladder is unclear. (Resp. Ex. B at 10.) Julia did not state whether she was talking
 7 about the position of her father’s feet on the ladder. (Resp. Ex. B at 10.) She did not
 8 differentiate which foot she was referring to, whether it was the lower or higher foot on the
 9 ladder. (Resp. Ex. B at 10.) She also does not define what she meant by halfway, as
 10 Mr. Neumann was not climbing the entire length of the ladder. (Resp. Ex. B at 10.) He was
 11 only climbing the nine rungs below the roofline. (Resp. Ex. B at 10.) Dr. Morse’s rebuttal
 12 report explains that if Mr. Neumann had been halfway down the entire length of the ladder,
 13 he would have been below the rung immediately below the center hinges. (Resp. Ex. B
 14 at 10.) The release bar being kicked is still a viable scenario.

15 The Court will not exclude an opinion of Plaintiffs’ expert simply because it does
 16 not align with Defendant’s opinion. The issue here is whether the expert’s opinion, based
 17 on sufficient data, is helpful to the jury in understanding the evidence. Defendant has not
 18 demonstrated that Dr. Morse’s testimony is unhelpful in this regard, but instead argues that
 19 Dr. Morse relied on facts that were not found in the record. (Mot. at 7-9; Reply at 9-10).
 20 As the Court has already stated, Defendant will have the opportunity to raise any issues
 21 with Dr. Morse’s interpretation of the relevant facts during cross-examination.

22 3. Legal Conclusions

23 Finally, Defendant contends that Dr. Morse offers inadmissible legal conclusions.
 24 (Mot. at 14-16.) Federal Rule of Evidence 704 allows an expert to express an opinion on
 25 an ultimate issue to be decided by the jury, but the Ninth Circuit has made clear that the
 26 propriety of an expert opinion on ultimate issues does not extend so far as to permit an
 27 expert to offer legal conclusions. *Muhktar v. Cal. State Univ., Hayward*, 299 F.3d 1053,
 28

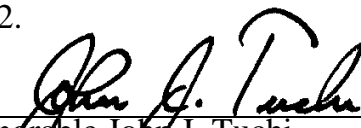
1 1065 n.10 (9th Cir. 2002) (“However, an expert witness cannot give an opinion as to her
2 legal conclusion, *i.e.*, an opinion on an ultimate issue of law.”).

3 To the extent that Defendant seeks to preclude Dr. Morse from testifying that it is
4 reasonably foreseeable “Krause locks *will* malfunction during ladder use” and “a user *will*
5 climb or stand on a ladder with a lock malfunction,” Defendants’ request is granted. (Mot.
6 Ex. A at 11. (emphasis added).) These opinions are improper legal conclusions. While it
7 may be appropriate for Dr. Morse to freely opine that in certain circumstances, Krause
8 locks malfunction, or users climb or stand on a ladder with a malfunctioning lock, he must
9 not volunteer an opinion that it is always reasonably foreseeable that such things occur.

10 Furthermore, to the extent that Dr. Morse implies legal conclusions, his testimony
11 will not be permitted. Because Plaintiffs assert strict liability claims related to Krause
12 ladders (Mot. Ex. 5 at 14-16), Dr. Morse should refrain from characterizing them as
13 “unreasonably dangerous” and “defective.”¹⁰ (Mot. Ex. 2 at 29-30, 32, 33.) These are terms
14 of art that will be ultimately determined by the jury. *See In re Juul Labs, Inc. Mktg., Sales*
15 *Pracs. & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2022 WL 1814440, at *14 (N.D.
16 Cal. June 2, 2022). While Dr. Morse can offer his opinion as to facts that, if found, would
17 support a conclusion that the legal standard for strict liability is satisfied, he may not testify
18 as to whether the legal standard has been satisfied. *See Burkhart v. Washington Metro.*
19 *Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997).

20 **IT IS THEREFORE ORDERED** granting in part and denying in part Defendant's
21 Rule 702/*Daubert* Motion to Exclude John Morse. (Doc. 36).

22 Dated this 2nd day of August, 2022.

23 
24 Honorable John J. Tuchi
25 United States District Judge

26
27 ¹⁰ The jury will decide whether Defendant sold Krause ladders “in a *defective* condition
28 *unreasonably dangerous* to the user or consumer or to his property.” *O.S. Stapley Co. v. Miller*, 103 Ariz. at 251, 447 P.2d at 551. (Mot. Ex. 5 at 14-15. (emphasis added).) If the jury finds Defendant did so, then Defendant is “subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property.” *Id.* (Mot. Ex. 5 at 15.)